IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 27, 2007 Session

GATE BLUEGRASS PRECAST, INC. v. LOREN L. CHUMLEY, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE

Direct Appeal from the Chancery Court for Davidson County
No. 03-3373-II Carol L. McCoy, Chancellor

No. M2007-00250-COA-R3-CV - Filed March 14, 2008

This lawsuit arises from taxpayer's assertion that it qualifies for tax exemptions provided to manufacturers by Tennessee Code Annotated § 67-6-206 and § 67-6-102. The trial court determined the exemptions are not available to taxpayer because taxpayer does not qualify as a "manufacturer" as defined by the taxation statutes. Taxpayer appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Michael G. Stewart and Brett R. Carter, Nashville, Tennessee, for the appellant, Gate Bluegrass Precast, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Charles L. Lewis, Deputy Attorney General and Wyla M. Posey, Assistant Attorney General, Nashville, Tennessee, for the appellee, Loren L. Chumley, Commissioner of Revenue of the State of Tennessee.

OPINION

The issue in this case is whether Plaintiff/Taxpayer Gate Bluegrass Precast, Inc. ("GBP") is a manufacturer entitled to the exemptions from sales and uses taxes on industrial machinery, raw materials, and utilities under Tennessee Code Annotated §§ 67-6-206 and 67-6-102(24)(E) as codified in the 1998 Tennessee Code. GBP is a Florida corporation with its principal place of business in Kentucky. GBP operates a facility in Ashland City, Tennessee, where it manufactures precast architectural concrete panels that are installed onto real property. GBP and Gate Concrete, which, on some projects, installs the concrete panels produced by GBP, are subsidiaries of Gate Petroleum Company. This dispute concerns GBP's activities at its Ashland, Tennessee, facility during the tax period from July 1, 1996 through September 30, 1999 ("the tax period").

During the tax period, GBP purchased materials used in the fabrication of its architectural concrete products under resale certificates, thereby obtaining an exemption from the sales and use taxes otherwise applicable to the materials. It also asserted the exemptions from taxes on industrial machinery and utilities afforded to manufacturers by Tennessee Code Annotated § 67-6-206. Following a sales and use tax audit for the tax period, the Department of Revenue ("the Department") determined GBP did not qualify for the sales and use tax exemption because it was not a "manufacturer" for the purposes of section 67-6-206. Rather, the Department determined GBP was correctly characterized as a "contractor/dealer" where it utilized most of the concrete panels it fabricated in fulfillment of its installation contracts. The Department assessed state and local sales and use taxes in the amount of $133,312.00, plus interest, on materials and custom molds, equipment repair, and utilities used by GBP during the tax period. On April 8, 2003, the Department issued a proposed adjusted assessment in the amount of $106,740.00 upon determining that GBP had sold some of its fabricated panels in its capacity as a dealer. GBP paid the assessment and filed a claim for refund on June 30, 2003. On July 16, 2003, the Department denied GBP's claim for refund.

In November 2003, GBP filed a complaint in the Chancery Court for Davidson County pursuant to Tennessee Code Annotated § 67-1-1803, asserting it qualified for the sales and use tax exemptions provided to manufacturers by the Code during the audited tax period. GBP and the Department filed cross-motions for summary judgment. Following oral argument on the parties' cross motions, the trial court determined GBP was not a "manufacturer" under Tennessee Code Annotated §§ 67-6-206(b)(2) and 67-6-209(c), but the end-user and consumer of the majority of the concrete panels it fabricates. The trial court entered final judgment on the matter on January 16, 2007, (TR at 381) and GBP filed a timely notice of appeal to this Court. We affirm.

Issue Presented

The issue presented for our review, as presented by BGP is:

> Whether the trial court erred in finding that Gate Bluegrass Precast, Inc. ("Appellant"), a company that derives over 70% of its gross sales from manufacturing concrete panels, does not qualify for the industrial machinery exemption to the sales tax under Tennessee Code Annotated § 67-6-206.

Standard of Review

The facts of this case are largely undisputed. The issue presented requires us to determine whether, as a matter of law, during the tax period at issue GBP acted as a contractor or end user of the personal property it fabricated, or whether it qualified as a "manufacturer" for the purposes of the exemptions provided by sections 67-6-206 and 67-5-102(24)(E) of the 1998 Code. We review issues of law *de novo*, with no presumption of correctness afforded to the determination of the trial court. *Taylor v. Fezell,* 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005). Likewise, to the extent to which the issue presented requires us to

review the trial court's construction of the exemption provided by Tennessee Code Annotated § 67-6-206 and the limitation provided by § 67-6-209(c), our review is *de novo*, with no presumption of correctness attached to the determination of the trial court. *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000).

The rules governing statutory construction are well-established. When interpreting a statute, the court is to "ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Hathaway v. First Family Fin. Servs., Inc.*, 1 S.W.3d 634, 640 (Tenn. 1999) (citations omitted). We must ascertain the intent of the legislature from the natural and ordinary meaning of the statutory language and in context of the entire statute, without forcing a construction that would limit or expand its scope. *JJ & TK Corp. v. Bd. of Comm'rs*, 149 S.W.3d 628, 630-31 (Tenn. Ct. App. 2004) (citations omitted). When the language of a statute is clear, we must utilize the plain, accepted meaning of the words used by the legislature to ascertain the statute's purpose and application. If the wording is ambiguous, however, we must look to the entire statutory scheme and at the legislative history to ascertain the legislature's intent and purpose. We must construe statutes in their entirety, assuming that the legislature chose the words of the statute purposely, and that the words chosen "convey some intent and have a meaning and a purpose" when considered within the context of the entire statute. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (citations omitted).

The court must construe tax statutes liberally against the taxing authority. Tax exemptions, however, are construed strictly against the taxpayer, who must carry the burden of demonstrating an entitlement to the exemption. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 950 S.W.2d 345, 348 (Tenn. 1997)(citations omitted). Tax exemptions will not be implied. *Hutton v. Johnson*, 956 S.W.2d 484, 488 (Tenn. 1997)(quoting *American Cyanamid Co. v. Huddleston*, 908 S.W.2d 396, 400 (Tenn. App. 1995). Rather, there is a presumption against exemption, "and any well founded doubt defeats a claimed exemption." *Id.*

With these rules in mind, we turn to the issue presented in this case.

Analysis

There is no dispute in this case that GBP fabricates precast architectural concrete panels at its Ashland facility, and the Department does not contend that GBP would not be entitled to the manufacturer's exemption provided in section 67-6-206 if it did not also contract, or subcontract, for the installation of most of the concrete panels it fabricated during the tax period. Rather, the Department asserts GBP is not entitled to the tax exemption applicable to industrial machinery, raw materials and utilities because it did not qualify as a "manufacturer" for the purposes of the exemption where it contracted to install a majority of the concrete panels it fabricated. The Department submits that most of GBP's contracts for the tax period were contracts to deliver and install concrete panels in real property, and not contracts for the sale of fabricated panels. It asserts that GBP fabricated a majority of the panels it produces for its own use as a contractor. The Department argues that, in light of *Security Fire Protection Co. v. Huddleston*, 138 S.W.3d

829(Tenn. Ct. App. 2003) and *Wiley Steel Fabricators v. Johnson*, 179 S.W.3d 509 (Tenn. Ct. App. 2005), GBP cannot claim the sales and use tax exemptions available to manufacturers because it utilized the products it fabricated in fulfillment of its own installment contracts.

GBP, on the other hand, asserts it is a manufacturer and not an end-user of its own fabricated products. It asserts that its principal business is fabricating concrete panels, and that, for some customers during the tax period, it subcontracted for the installation of the panels as a convenience to the customer. It asserts that the majority of its gross revenue during the tax period was derived from the sale of the concrete panels it fabricated. If further asserts that, under *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669 (Tenn. 1990) provisions in its contracts for the installation of the fabricated panels were severable from the provisions relating to sales. It asserts its primary business is fabricating concrete panels for resale, and that it is not primarily a contractor.

We begin our analysis by noting that the Code applicable to this dispute is the Code as it existed during the tax period at issue. However, we further note that, although some of the Code provisions have been renumbered, the current Code remains substantively the same with respect to the statutory portions relevant to this case. Thus, although we will utilize the 1998 version of the Tennessee Code in our analysis here, we note that the construction of the term "manufacturer" for the purposes of the exemption claimed by GBP is equally applicable to cases considered under the current Code.

The Retail Sales Tax Act, as codified at Tennessee Code Annotated § 67-6-101 *et seq*., provides:

> It is declared to be the legislative intent that every person is exercising a taxable privilege who:
>
> (1) Engages in the business of selling tangible personal property at retail in this state;
>
> (2) Uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof;
>
> (3) Is the recipient of any of the things or services taxable under this chapter;
>
> (4) Rents or furnishes any of the things or services taxable under this chapter;
>
> (5) Stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter;
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> (6) Leases or rents such property, either as lessor or lessee, within the state of Tennessee;
>
> (7) Charges admission, dues or fees taxable under this chapter; or
>
> (8) Sells space under this chapter.

Tenn. Code Ann. § 67-6-201(1998).[1]

Tennessee Code Annotated § 67-6-206 provides an exemption from sales and use taxes on "industrial machinery and raw materials" and utilities. The version of the Code in effect during the tax period at issue here provided, in pertinent part,

> (a) After June 30, 1983, no tax is due with respect to industrial machinery.
>
> (b)(1) Tax at the rate of one percent (1%) is likewise imposed with respect to water when sold to or used by manufacturers. Tax at the rate of one and one-half percent (1.5%) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels when sold to or used by manufacturers.
>
> (2) For the purpose of this subsection, "manufacturer" means one whose principal business is fabricating or processing tangible personal property for resale.
>
> (3) Such substances shall be exempt entirely from the taxes imposed by this chapter whenever it may be established to the satisfaction of the commissioner, by separate metering or otherwise, that they are exclusively used directly in the manufacturing process, coming into direct contact with the article being fabricated or processed by the manufacturer, and being expended in the course of such contact. Whenever the commissioner determines that the use of such substances by a manufacturer meets such test, the commissioner shall issue a certificate evidencing the entitlement of the manufacturer to the exemption, and a certified copy thereof shall be furnished by the manufacturer to the manufacturer's supplier of such exempt substances. The certificate may be revoked by the commissioner at any time upon a finding that the conditions precedent to the exemption no longer exist. The commissioner's action as to the granting or revoking of a certificate shall be reviewable solely by a petition for common law certiorari addressed to the chancery court of Davidson County.

Tenn. Code Ann. § 67-6-206(a)&(b)(1)-(3)(1998).[2]

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[1]The legislative intent remains unaltered with respect to subsections (1) through (8). Tenn. Code Ann. § 67-6-201(2006 & Supp. 2007)

[2]The current Code provides, in pertinent part:

> (a) After June 30, 1983, no tax is due with respect to industrial machinery.
>
> (b)(1) Tax at the rate of one percent (1%) is imposed with respect to water when sold to or used by manufacturers. Tax at the rate of one and one-half percent (1.5%) shall be imposed with respect to gas, electricity, fuel oil, coal and other energy fuels when sold to or used by manufacturers.
>
> (2) For the purpose of this subsection (b), "manufacturer" means one whose principal business is fabricating or processing tangible personal property for resale.
>
> (3) The substances shall be exempt entirely from the taxes imposed by this chapter whenever it may be established to the satisfaction of the commissioner, by separate metering or otherwise, that they are exclusively used directly in the manufacturing process, coming into direct contact with the article being fabricated or processed by the manufacturer, and being expended in the course of such

(continued...)

The Code defines "industrial machinery" as:

> [m]achinery, apparatus and equipment with all associated parts, appurtenances and accessories, including hydraulic fluids, lubricating oils, and greases necessary for operation and maintenance, repair parts and any necessary repair or taxable installation labor therefor, which is necessary to, and primarily for, the fabrication or processing of tangible personal property for resale and consumption off the premises . . . .

Tenn. Code Ann. § 67-6-102(13)(A)(1998).[3] Thus, in order to qualify for the exemption provided by section 67-6-206(a), the taxpayer must demonstrate that the machinery asserted to be exempt "is necessary to and primarily for, the fabrication or procession of tangible personal property for resale and consumption off the premises." "'Fabricating or processing tangible personal property for resale' means only tangible personal property which is fabricated or processed for resale and ultimate use or consumption off the premises of the one engaging in such fabricating or processing . . . ." Tenn. Code Ann. § 67-6-102(8)(1998).[4] Although the 1998 Code did not explicitly define "resale," it defined "sale," in pertinent part, as:

> any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property[.]

Tenn. Code Ann. § 67-6-102(25)(A)(1998). The current Code contains an identical definition of "sale." Tenn. Code Ann. § 67-6-102(70)(A)(Supp. 2007). Additionally, the Tennessee Code currently defines "resale" as: "a subsequent, bona fide sale of the property, services, or taxable item

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contact. Whenever the commissioner determines that the use of the substances by a manufacturer meets the test, the commissioner shall issue a certificate evidencing the entitlement of the manufacturer to the exemption. A copy of the certificate issued by the commissioner or a fully completed Streamlined Sales Tax certificate of exemption, which must include the manufacturer's exemption authorization number included on the certificate issued by the commissioner, shall be furnished by the manufacturer to the manufacturer's supplier of the exempt substances. The certificate may be revoked by the commissioner at any time upon a finding that the conditions precedent to the exemption no longer exist.

Tenn. Code Ann. § 67-6-206(a)&(b)(1)-(2)(2006 & Supp. 2007).

[3]Currently found at Tennessee Code Annotated § 67-6-102(39)(A)(i)(Supp. 2007).

[4]Currently found at Tenn. Code Ann. § 67-6-102(32)(Supp. 2007).

by the purchaser." Tenn. Code Ann. § 67-6-102(67)(Supp. 2007) The current Code defines "[s]ale for resale" as: "the sale of the property, services, or taxable item intended for subsequent resale by the purchaser." *Id.* It further provides: "Any sales for resale shall, however, be in strict compliance with rules and regulations promulgated by the commissioner." *Id.*

The 1998 Code defined "[r]etail sales" or a "sale at retail" as: "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than for resale." Tenn. Code. Ann. § 67-6-102(24)(A)(1998). However, the Code provided:

> "Sale at retail," "use," "storage," and "consumption" do not include the sale, use, storage or consumption of:
>
> (i) Industrial materials and explosives for future processing, manufacture or conversion into articles of tangible personal property for resale where such industrial materials and explosives become a component part of the finished product or are used directly in fabricating, dislodging, sizing, converting or processing such materials or parts thereof[.]

Tenn. Code Ann. § 67-6-102(24)(E)(1998).

Thus, reading section 67-6-206 together with the applicable defined terms, the exemption from sales and use taxes provided by the section may be claimed by a taxpayer whose principal business is the fabricating or processing of tangible personal property that subsequently is resold pursuant to a bona fide sale to a consumer for use or consumption off the property of the taxpayer. As a general rule in the statutory scheme, the substantive equivalent of a transfer of the fabricated property to the same taxpayer for use by that taxpayer in the taxpayer's own contract for construction or installation, however, does not constitute a bona fide sale for purposes of sales and use tax exemptions. *Security Fire Prot. Co. v. Huddleston*, 138 S.W.3d 829, 839 (Tenn. Ct. App. 2003)(holding that materials purchased under a certificate of resale by a contractor/dealer are not exempt from sales tax when used in the performance of the taxpayer's own contract). In *Security Fire*, for example, we held that a taxpayer who purchased materials under a certificate of resale, incorporated them into fire protection systems, and installed the systems as a subcontractor on job sites outside of Tennessee, did not resell or manufacture the materials for export, but used them in performance of its own contracts. *Id.* at 838-40. Accordingly, the taxpayer was liable for the sales and use tax on those materials.

The Tennessee Supreme Court has recognized the Department's long use of what is known as the "51 percent rule" to determine whether a taxpayer who manufactures goods at any location is primarily a "manufacturer" for purposes of the exemption provided by section 67-6-206. *Alley-Cassetty Coal Co. v. Johnson*, No. M2003-02327-COA-R3-CV, 2005 WL 729180, at *4 (Tenn. Ct. App. Mar. 29, 2005)(*no perm. app. filed*)(citing *Tenn. Farmers' Coop. v. State*, 736 S.W.2d 87, 89 (Tenn.1987)). Under this rule, the taxpayer is entitled to the exemption provided by § 67-6-206 if the fabricating or processing of tangible personal property produces at least 51 percent of the total revenue at that location. *Beare Co. v. Tennessee Dep't of Revenue*, 858 S.W.2d 906, 909

(Tenn. 1993); *Tenn. Farmers' Coop.*, 736 S.W.2d. at 89. The determination is based on the Department's examination of the taxpayer's gross sales at each location. *Tenn. Farmers' Coop.*, 736 S.W.2d. at 91 (citing Tenn. Code Ann. §§ 67-6-202 & 67-6-102(7)(Supp. 1986)). It is not derived from the percentage of resources allocated to the manufacturing or fabricating process. *Id.* at 91. Thus, although more than 51 percent of a taxpayer's fuel and water consumption may be used in the fabrication process, the taxpayer's "principal business at a specified location" for the purposes of the exemption afforded by section 67-6-206(b) is not the "fabricating or processing of tangible personal property for resale and for ultimate use or consumption off [the] premises" if less than 51 percent of the taxpayer's gross sales is derived from the sale of the fabricated or manufactured property. *Id.* (citing Tenn. Admin. Comp. 1320-5-1-.15(2)).

Section 67-6-209(b), the "contractor's use statute," moreover, imposes a use tax on property withdrawn from inventory and used by a contractor in the performance of his contract. *Sodexho Mgmt., Inc. v. Johnson*, 174 S.W.3d 174, 176-77 (Tenn. Ct. App. 2004); *Security Fire Prot. Co. v. Huddleston*, 138 S.W.3d 829, 843 (Tenn. Ct. App. 2003). The section avoids double taxation, however, by exempting property previously subject to a sales or use tax in Tennessee. *Security Fire*, 138 S.W.3d at 843. Section 67-6-209(c), moreover, provides that "the tax imposed by this section shall have no application where the contractor or subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provision" of chapter six. However, subsection 209(c) limits this exception by providing that the transfer of property by a contractor who contracts for the installation of the property as an improvement to realty does not constitute a sale for the purposes of the manufacturer's exemptions available under § 67-6-206 or § 67-6-102. Section 67-6-209(c) provides:

> [h]owever, the transfer of tangible personal property by a contractor who contracts for the installation of such tangible personal property as an improvement to realty does not constitute a sale, except as provided in 67-6-102(7), and the contractor shall not be permitted on this basis to obtain the benefit of any exemptions or reduced tax rates available to manufacturers under § 67-6-206 or § 67-6-102(23)(E).[5]

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[5]We take notice of the frequent revisions to the provisions of § 67-6-102, and observe that § 67-6-102(23)(E) did not exist in the 1998 Code. We further note that§ 67-6-209(c) as contained in the 2006 Code references § 67-6-102(32)(E), which did not exist in the 2006 Code. In light of our analysis of the applicable Code provisions, we believe the correct references are to § 67-6-102(24)(E) in the 1998 Code, and § 67-6-102(34)(E) in the 2006 Code. Additionally, section 67-6-209(c) as contained in the 2007 supplement to the Code references § 67-6-102(34)(E). However, § 67-6-102 as contained in the 2007 supplement has been significantly amended, and the definition of "resale" and "retail sale or sale at retail" considerably altered. Section 67-6-102(34) as contained in the 2007 supplement defines "flea market," a definition we find irrelevant to § 67-6-209.

Likewise, § 67-6-102(7) referenced in the subsection defines "dealer." In the 1999 version of the Code available at Westlaw, however, subsection 209(c) references § 67-6-102(8), which defines "fabricating or processing tangible personal property for resale." Section 67-6-102(7) & (8) as available on Westlaw for the 1999 version of the Code remain as provided in the 1998 Code. *See West,* Westlaw through 1999. In either case, construing § 67-6-209(b) and (c) together, and in light of the definitions of "dealer" and "fabricating . . . tangible personal property for resale" contained in § 67-6-102(7)(A) and (8), the use of fabricated tangible personal property by a taxpayer who fabricates (continued...)

Tenn. Code Ann. § 67-6-209(c)(1998). In short, the use by a contractor of tangible personal property fabricated or manufactured by that contractor in fulfillment of a contract for improvement to real property does not constitute a resale or retail sale for purposes of the manufacturer's exemption despite transfer of the property by the contractor. Under § 67-6-209(b) & (c), a taxpayer, whether otherwise defined as a dealer or manufacturer, has not engaged in a "sale" or "resale" when that taxpayer uses the personal property in fulfilment of his own installation contract. *See Security Fire*, 138 S.W.3d at 843.

The Department contends that GBP is not a manufacturer for purposes of § 67-6-206, but a contractor and end-user of more than 51 percent of the personal property that it fabricates. It asserts that GBP "contracts to install most of the precast concrete panels it fabricates." Its argument, as we understand it, is that, because GBP uses a majority of the concrete panels it fabricates in the performance of contracts that include delivery and installation of the panels onto real property, under the 51 percent test, GBP's molds and materials are not "industrial machinery," i.e. machinery used primarily for the manufacture of tangible personal property for resale and consumption off the premises, as defined in § 67-6-102; that GBP is not entitled to an exemption from taxes on utilities under section 67-6-206(b) because its principal business is not fabricating or processing tangible personal property for resale; and that GBP is not entitled to the sales exemption on raw materials purchased under a resale certificate.

GBP asserts that it is not a contractor but a manufacturer that sometimes hires subcontractors to transport, erect and install the panels as a convenience for some "select customers." It submits that it earned more than 77 percent of its revenue from the manufacture of concrete panels during the period at issue here, and that revenue derived from sales of the panels comprised greater than 50% of GBP's gross sales from the Ashland City facility. It therefore argues that, under the 51 percent test, the trial court erred in determining it was not a manufacturer for purposes of the exemption provided by § 67-6-206. GBP relies on *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669 (Tenn. 1990), for the proposition that, to the extent to which it contracted to install the panels for some customers, the installation component of its contracts was a secondary, severable transaction, and that its primary activity was manufacturing.

The taxpayer in *Penske* was a truck lessor who leased vehicles under lease and service agreements that provided for fixed rate payments for use of the vehicles, plus fixed mileage rates that included the cost of maintenance. *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 670 (Tenn. 1990). The taxpayer paid sales and use taxes on revenues derived from the leases. *Id.* The taxpayer in *Penske* also gave its lessees the option of purchasing fuel for the leased vehicles. *Id.* The lessee had the option of purchasing fuel from other vendors, however. *Id.* The lessee who agreed

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the property is not a "sale" for purposes of the exemptions from sales and use taxes when used by that taxpayer in fulfillment of an installation contract.

In making these observations regarding the numbering of the Code provisions, we emphasize that we are not insensitive to the complexities inherent in amending the tax statutes.

to purchase fuel from the taxpayer was billed separately for fuel by the taxpayer's fuel sales division. *Id.* Additionally, a lessee who initially agreed to purchase fuel from the taxpayer as part of the lease agreement but who, during the term of the vehicle lease contract, decided to change the fuel portion of the lease could do so without any modification of the fixed vehicle lease rate or fixed mileage rate. *Id.* The taxpayer in *Penske* did not include its advance fuel billings and fuel reconciliations as part of the gross proceeds of its lease agreements that were subject to sales and use taxes. *Id.* at 670. The taxpayer did, however, pay the required privilege and gallonage taxes on the sale and use of gasoline and motor vehicle fuel sold to its lessees. *Id.* at 671. In *Penske*, the Department assessed sales and use taxes on the advance fuel billings and fuel reconciliations, asserting that because fuel costs were included in the agreed rental price, the entire lease payment was subject to use taxes under *Magnavox Consumer Electronics v. King*, 707 S.W.2d 504 (Tenn. 1986). *Id.* at 670. The taxpayer in *Penske* did not challenge the holding in *Magnavox*, but asserted that, unlike the taxpayer in *Magnavox*, its fuel costs were not included in the rental price of the equipment. *Id.* It asserted that its fuel purchase agreements were separate and severable from its vehicle lease agreements, and that the fuel purchase agreements were exempt from sales and use taxes under Tennessee Code Annotated § 67-6-329(a), which exempts gasoline sales where the privilege tax per gallon has been paid, and motor vehicle fuel sales where the per gallon tax has been paid. *Id.* at 671. The Tennessee Supreme Court concluded that the vehicle lease agreements and fuel sales agreements in *Penske* were "separate parts of a divisible contract." *Id.* It accordingly held that the Department erred by including the taxpayer's fuel sale receipts in determining the gross receipts from the vehicle lease agreements that were subject to sales and use taxes. *Id.*

We do not believe the case now before us is entirely analogous to any of the cases relied on by the parties, but requires us to construe the Code provisions addressed in those cases together with § 67-6-209(b) and (c). In *Security Fire*, the taxpayer unquestionably was a contractor who purchased materials under a certificate of resale. We held, "Security Fire's contracts unambiguously were subcontracts for the design, building, and installation of fire protection systems." *Security Fire Prot. Co. v. Huddleston*, 138 S.W.3d 829, 835 (Tenn. Ct. App. 2004). Taxpayer Security Fire unambiguously was not selling the fire protection systems it fabricated as items of tangible personal property separable from the installation of those systems. *Id.* at 836. Additionally, the taxpayer in that case did not claim the manufacturer's exemption provided by § 67-6-206, which specifically requires the taxpayer to be engaged in the manufacture of items of tangible personal property for resale and to derive greater than 51 percent of its gross sales revenue from those products. Thus, although the reasoning in *Security Fire* is applicable insofar as noted above, *Security Fire* is of less assistance in determining whether GBP is a manufacturer of tangible personal property for resale for the purposes of § 67-6-206.

The taxpayer in *Wylie Steel* likewise did not claim the manufacturer's exemption provided by § 67-6-206. Rather, in that case, taxpayer Wylie Steel Fabricators asserted the exemption provided by § 67-6-209(b), which exempts contractors from the use tax imposed on personal property by the section where the title holder of the personal property is a church or nonprofit college or university. Thus, we agree with GBP that *Wylie Steel* is not determinative here.

We turn next to GBP's assertion that *Penske* stands for the proposition that the sales portion of its contracts were severable from the installation components. GBP asserts that its customers during the tax period had the option of purchasing the concrete panels it fabricated as personal property without installation. In its response to the Department's statement of undisputed facts for the purposes of summary judgment, however, GBP agreed that it contracted to install most of the panels it fabricated. However, it argues that, upon severing the sales price of the concrete panels from the provisions relating to the installation subcontract provisions, it is clear that GBP derived greater than 51 percent of its revenue from the sales of the concrete panels and that installation was but a minor portion of its contracts in terms of revenue. It asserts that it should accordingly be considered a manufacturer under the 51 percent test.

We begin our analysis of GBP's argument that its contracts were comparable to the contracts in *Penske* by noting that, although the issue in *Penske* was the severability of two distinct aspects of the taxpayer's contracts with its lessees, *Penske* also involved a sales and use tax exemption conditioned upon the prior payment of privilege and per gallon taxes. *Penske*, 795 S.W.2d at 671; *see* Tennessee Code Annotated § 67-6-329(a)(2006). The taxpayer in *Penske* demonstrated that it had paid the taxes that would have been attributable to it upon the retail sale of the fuel. *Id.* It also demonstrated that it had paid the sales and use taxes attributable to its vehicle leases. *Id.* at 670. Finally, it demonstrated that the vehicle lease contract prices were fixed and not impacted by the lessee's decision to purchase fuel as an optional convenience. *Id.* We turn to GBP's contracts with these distinctions in mind.

The interpretation of a contract is a matter of law that we review *de novo* on the record with no presumption of correctness for the determination of the trial court. *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006). The "cardinal rule" of contract construction is to ascertain the intent of the parties and to effectuate that intent consistent with applicable legal principles. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999). When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written. *Int'l Flight Ctr. v. City of Murfreesboro*, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000).

Upon review of the record, it is clear that GBP sold at least some of the concrete panels it fabricated as items of tangible personal property without also contracting to install them. GBP asserts that, although in many of its sales it subcontracted to erect the panels, its customers had the option of purchasing the panels and hiring another subcontract to install them. There is nothing in the record to indicate that the customer's decision to contract for the installation of the concrete panels impacted the sales price of the panels. The gross revenue derived from the "manufacturing sales" components of GBP's contracts clearly was greater than 51 percent of GBP's total revenue. Viewing the revenue streams separately and distinctly, as GBP urges is appropriate under *Penske*, it is evident that the income derived from the "manufacturing sales" component of GBP's contracts comprised greater than 51 percent of GBP's total revenues.

However, the sample contract contained in the record belies the apparent severability based on distinct revenue streams. The November 1997 contract entered into with Turner Construction Company ("the Turner Contract"), for example, clearly was a subcontract for the installation of precast concrete work at the Highwoods Office Park in Franklin, Tennessee. The contract provided that GBP, "hereinafter called the Subcontractor . . . shall perform and furnish all the work, labor, services, materials, plant, equipment, tools, scaffolds, appliances and other things necessary for Architectural Precast Concrete Work." The detailed, seventeen-page contract bound GBP, as subcontractor, to furnish and install architectural precast panels "in a logical sequence, coordinated and approved in advance by Turner." The scope of work described in the contract included "[a]ll hoisting for performance of this subcontractors work. Provide cranes of sufficient size and capacity to erect precast . . . Provide provisions for the safety of erectors in accordance with the latest OSHA fall protection safety guidelines." The contract additionally provided,

> Turner shall not be responsible for any loss or damage to the Work to be performed and furnished under this Agreement, however caused, until after final acceptance thereof by Turner and the Architect, nor shall Turner be responsible for loss of or damage to materials, tools, equipment, appliances or other personal property owned, rented or used by the Subcontractor or anyone employed by it in the performance of Work, however caused.

It also provided that GBP would be liable for "[a]ll contributions, taxes or premiums . . . . [a]ll sales, use, personal property and other taxes . . . ." The contract specified that GBP would "expressly waive, release and relinquish" the right to assert any lien, including a materialman's lien, against the project, and that, should any "subcontractor, laborer, materialman or supplier" of GBP file any lien or claim, GBP would "cause such liens and claims to be satisfied, removed or discharged at its own expense."

Like the contracts in *Security Fire*, the Turner Contract was clearly a contract for the installation of fabricated personal property. Unlike the contracts in *Penske*, GBP's contracts, as evidence by the sample in the record, were not separate parts of a divisible contract. The court in *Penske* was "convinced that the parties to the lease agreements intended and understood that the lease of equipment was separate and apart from the fuel sales agreement, though . . . included in the same document." *Penske*, 795 S.W.2d at 671. We, however, are not convinced that Turner Construction, for example, understood its purchase of precast concrete panels to be separate and apart from the installation of those panels. Although, as GBP submits, the contract may be dissected in terms of revenue components, and the cost of the concrete panels (materials) distinguished from the costs relating to installation, the contract clearly was not a contract for the sale of tangible personal property. GBP undoubtedly fabricated the concrete panels in fulfillment of the complete delivery and installation contract. Moreover, GBP assumed the liability for any taxes due arising from the installation of the concrete work onto real property.

Moreover, assuming, *arguendo*, that over 51 percent of GBP's gross revenue was derived from "manufacturing sales" as separable from the remainder of its installation contracts, section 67-

6-209(c) is not, contrary to GBP's assertion in its reply brief to this Court, merely a codification of the common-law rule that the 51 percent test is applicable at each location. Subsection (c) of section 209 provides an exception to the tax liability imposed by the section. Subsection (c) provides that "[t]he tax imposed by this section shall have no application where the contractor or subcontractor . . . would be exempt from the sales or use tax under any other provision of this chapter." As noted above, the subsection then creates an "exception to the exception," however, by providing that

> [h]owever, the transfer of tangible personal property by a contractor who contracts for the installation of such tangible personal property as an improvement to realty does not constitute a sale, except as provided in § 67-6-102(7), and the contractor shall not be permitted on this basis to obtain the benefit of any exemptions or reduced tax rates available to manufacturers under § 67-6-206 or § 67-6-102[(24)](E).

Tenn. Code Ann. § 67-6-209(c)(1998). The subsection also provides that the determination of whether the taxpayer would be disqualified as a manufacturer is made on a location by location basis.

Subsection 209(c) specifically provides that an installation contract that includes the transfer of tangible personal property by a contractor as an improvement to realty does not constitute a sale upon which the exemption available to manufacturers may be based. We agree with the Department that, under subsection 209(c), a taxpayer who fabricates personal property for the taxpayer's own use in the fulfillment of his installation contracts has not "sold" the property and cannot obtain the manufacturer's exemption based on this transfer. Such a taxpayer is not a "manufacturer" who fabricates personal property for resale, but a contractor who fabricates property for his own use. Thus, in order to qualify as a manufacturer for the purposes of tax exemptions provided to manufacturers by the Code, a taxpayer who both fabricates and installs tangible personal property must demonstrate that at least 51 percent of his total revenue was derived from the sale of fabricated tangible personal property not transferred in fulfillment of his contract(s) for the installation of tangible personal property as an improvement to real property.

This construction effectuates the general statutory scheme wherein the recipient of any taxable "things or services" is exercising a taxable privilege. Tenn. Code Ann. § 67-6-201(3)(1998). Within this scheme, "a tax [is imposed] upon the privilege of use by a contractor of tangible personal property, regardless of the title, where such property has not previously borne a sales or use tax." *Pan Am World Servs., Inc. v. Jackson*, 754 S.W.2d 53, 56 (Tenn. 1988)(quoting *United States v. Boyd*, 211 Tenn. 139, 163, 363 S.W.2d 193, 203 (1962), aff'd 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713 (1964)). Taxpayers who demonstrate that at least 51 percent of their total gross sales revenue is derived from the sale of tangible personal property fabricated or processed by them obtain certain manufacturer's exemptions under Tennessee Code Annotated §§ 67-6-102 and 67-6-206. Further, subject to specific statutory exemptions, the resale or eventual sale at retail of manufactured tangible personal property is a taxable event. Tenn. Code Ann. § 67-6-201. However, under Tennessee Code Annotated § 67-6-209(c), the transfer of tangible personal property pursuant to an installation contract as an improvement to realty is not a sale that provides a basis upon which the taxpayer may obtain the manufacturer's exemptions provided by § 67-6-206 and § 67-6-102. Where

a taxpayer uses the tangible personal property he fabricates in fulfillment of his own installation contract, he is a contractor and not a manufacturer as defined by the Code. It follows that a taxpayer who cannot demonstrate that at least 51 percent of his total gross sales revenue is derived from the sale of fabricated tangible personal property that is not transferred as part of his contract(s) for the installation of personal property as an improvement to real property cannot obtain tax exemptions exclusively available to manufacturers.

In this case, GBP does not assert that greater than 50 percent of its gross sales revenue was derived from the sale of fabricated tangible personal property that was not utilized in fulfillment of installation subcontracts entered into by GBP. Rather, the majority of the concrete panels fabricated by GBP were fabricated in fulfillment of GBP's subcontracts for the installation of those panels onto real property. Accordingly, we agree with the Department and the trial court that GBP did not qualify as a manufacturer during the tax period for the purposes of the industrial machinery sales tax exemption provided by Tennessee Code Annotated § 67-6-206.

Holding

In light of the foregoing, we affirm the judgment of the trial court. Costs of this appeal are taxed to the Appellant, Gate Bluegrass Precast, Inc., and its surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE